

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

SAINT XAVIER UNIVERSITY,)	
)	
Employer,)	
)	
And)	Case No. 13-RC-092296
)	
SERVICE EMPLOYEES INTERNATIONAL)	
UNION, LOCAL 1,)	
)	
Petitioner.)	
)	

**SAINT XAVIER UNIVERSITY’S REQUEST FOR REVIEW
OF THE REGIONAL DIRECTOR’S SUPPLEMENTAL
DECISION AND DIRECTION OF ELECTION**

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**SAINT XAVIER UNIVERSITY’S REQUEST FOR REVIEW
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PRELIMINARY STATEMENT

Saint Xavier University (“the University”), requests review of Region 13’s June 23, 2015 Supplemental Decision and Order in *Saint Xavier University and Service Employees International Union, Local 1*, Case Number 13-RC-092296, pursuant to Section 102.67(b)&(c) of the National Labor Relations Board’s (the “Board”) Rules and Regulations. As noted herein, there are compelling reasons for reconsideration of an important Board rule. *See* Rules & Regulations, §102.67(c)(4).

Review is necessary because there are compelling reasons for the Board to reconsider the important rule it announced in *Pacific Lutheran University*, 361 NLRB No. 157 (Dec. 16, 2014) (“*PLU*”). *See* 29 C.F.R. 102.67(c)(4). Review is further necessary because (a) the Board’s decision in *PLU* is the only application of that rule, and thus there is a dearth of officially reported Board precedent applying that rule, and (b) the Region departed from the Board’s decision in *PLU* in asserting jurisdiction over Saint Xavier. *See* 29 C.F.R. 102.67(c)(1).

PROCEDURAL HISTORY

The record in this case is a stipulated record. Nov. 15, 2012 Tr. 6.¹ The parties stipulated to the admission of the complete record in Case No. 13-RC-22025 (including the transcript and all of the exhibits) into the record of this case. Nov. 15, 2012 Tr. 6. The parties also stipulated to the scope of the proposed unit and the job duties of the employees in the proposed unit. Nov. 15, 2012 Tr. 6. Finally, the parties stipulated that the only issue before the Regional Director was whether the Board has jurisdiction over the University. Nov. 15, 2012 Tr. 6. By Decision and Direction of Election dated November 28, 2012, the Regional Director found it appropriate to assert jurisdiction over Saint Xavier under the Board's former substantial religious character test and directed an election to be held. Saint Xavier timely filed a Request for Review with the Board on December 12, 2012. An election was conducted and the ballots impounded by the Region.

The Board granted Saint Xavier's Request for Review on February 20, 2013, and invited further briefing regarding whether the Board should deny jurisdiction because Saint Xavier qualified as a religious educational institution under the Supreme Court's decision. While the matter was pending, on December 16, 2014, the Board in *PLU* discarded its constitutionally infirm substantial religious character test and articulated a new standard whereby it would decline jurisdiction over a religious university if the university: (1) makes a minimal showing that it holds itself out as providing a religious educational environment ("Prong 1"), and then (2) demonstrates that it holds out employees in the petitioned-for unit as performing a specific role in creating or maintaining that religious educational environment ("Prong 2"). *PLU*, at *1.

¹ References to the transcript of the proceedings are designated as "Nov. 15, 2012 Tr. ____." References to the transcript from Case No. 13-RC-22025 are designated as "Tr. ____." Board's exhibits, Petitioner's exhibits, and the Employer's exhibits from Case No. 13-RC-22025 are designated as "BD Ex. ____," "PET Ex. ____," and "ER Ex. ____," respectively.

By Order dated February 12, 2015, the Board remanded the instant case back to the Region for reconsideration under *PLU*. As the Board's Order noted, "*Pacific Lutheran* specifically addressed, among other things, the Board's new standard for determining, in accordance with the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), when the Board should decline to exercise jurisdiction over faculty members at self-identified religious colleges and universities."

The parties filed position statements with the Region. Saint Xavier argued in its brief that (a) the Board should discard the *PLU* Test in favor of the *Great Falls* Test and (b) in any event Saint Xavier met the *PLU* Test. By Supplemental Decision and Order dated June 23, 2015 (the "June 23 Order"), the Region held that Saint Xavier met Prong 1 of the *PLU* Test, but not Prong 2, and ordered that the ballots previously impounded be counted.

RELEVANT FACTS

An initial matter, the University does not contest the natural right of workers to organize and to bargain collectively, and the moral duty of employers to bargain. Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1398 (1981) (footnote omitted). The Roman Catholic Church "recognizes the fundamental role played by labor unions, whose existence is connected with the right to form associations or unions to defend the vital interests of workers employed in the various professions." Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, VI(a) §305 (2004). The University supports the Church's teaching in this regard. Government control over labor matters, however, is a different matter because it jeopardizes Church autonomy and the autonomy of religiously-affiliated colleges and universities in how they carry out their religious missions. The issue in this matter is not whether

the employees in the petitioned-for unit may organize. Rather, the issue is whether the government can and should exercise control or influence over how a religiously-affiliated university carries out its religious mission. For that reason, the only appropriate action in light of *PLU* and *Catholic Bishop of Chicago* and other applicable precedent cited herein is for the Region to decline to assert jurisdiction and to dismiss the petition.

I. THE UNIVERSITY'S HISTORY AND RELATIONSHIP WITH THE SISTERS OF MERCY

A. The University's Origin.

The University is the oldest Catholic university in Chicago and was established by the Sisters of Mercy in 1846. *See* ER Ex. 14; ER Ex. 17, pp. 1-2. The Sisters of Mercy are a Catholic religious order founded by Mother Mary Catherine McAuley in Dublin, Ireland in 1831. ER Ex. 14; ER Ex. 17 pp. 1-2. As an apostolic order, the Sisters of Mercy are responsible directly to the Holy See of the Catholic Church, *i.e.*, the Pope. *See* Tr. 23-24.

In 1846, Mother Frances Xavier Warde and five other Sisters traveled to Chicago to start the Chicago foundation of the Sisters of Mercy. *See* ER Ex. 14; ER Ex. 17, p. 3. Three weeks later, the Sisters of Mercy opened Saint Francis Xavier Academy for Females at Michigan Avenue and Madison Street in downtown Chicago; the Academy was officially chartered under Illinois state law on February 27, 1847, and was named after Mother Frances Xavier Warde's patron saint, Saint Francis Xavier. ER Ex. 7; ER Ex. 14; ER Ex. 17, p. 1; ER Ex. 18. Eventually, the Saint Francis Xavier Academy for Females grew to the point that the Sisters of Mercy divided it into two organizations that remain vibrant today: Saint Xavier College, which

later became Saint Xavier University,² and Saint Xavier Academy, which is now Mother McAuley Liberal Arts High School. *See* ER Ex. 14; ER Ex. 18.

B. The Sisters of Mercy’s Conference *for* Mercy Higher Education.

This rapid growth was not unique to the Chicago Sisters of Mercy. The Sisters of Mercy started foundations in other cities throughout the United States and eventually these organizations collectively became the Institute of the Sisters of Mercy of the Americas.³ *See* ER Ex. 14; ER Ex. 5. The Sisters of Mercy founded schools and universities throughout the United States. *See* ER Ex. 14; ER Ex. 18, p. 4. The Catholic Church recognizes these colleges and universities as official ministries of the Catholic Church through the sponsorship of the Sisters of Mercy. *See* Tr. 49-51. Currently, the Sisters of Mercy have sixteen universities and colleges in the United States, which are referred to as the “Mercy colleges,” or “Mercy institutions.” Tr. 50, 52; ER Ex. 5, pp. 4, 5, 7.

The Sisters of Mercy sponsor the Mercy institutions through the Conference *for* Mercy Higher Education, Inc. (CMHE), which is the corporate arm of the Sisters. *See* Tr. 50; ER Ex. 5, pp. 2, 5, 7. The sponsor council of the CMHE consists of five members, who are all Sisters of Mercy. *See* ER Ex. 5, p. 3. The CMHE Board of Trustees consists of Sisters of Mercy and lay persons, and has liaisons with each of the Mercy institutions. Tr. 51.

The mission of the CMHE is very clear. Its purpose is to sponsor the ministry of higher education while preserving Catholic values and the mission of the Sisters of Mercy: “The mission of the [CMHE] is the preservation and development of the core Catholic identity and mission of Mercy higher education in accord with the spirit, mission, and heritage of the Sisters

² Saint Xavier College became coeducational in 1969, and changed its name to Saint Xavier University in 1992. ER Ex. 18.

³ Although this is their official title, the Sisters will be referred to throughout the brief by their colloquial name, *i.e.*, the Sisters of Mercy.

of Mercy.” ER Ex. 5, p. 2. The CMHE monitors each of the sixteen colleges and universities to ensure that they are faithful to their Catholic values and Mercy mission. *See* ER Ex. 9. The CMHE’s description of its institutions shows the nature of its dedication, and the dedication of its universities, to implementing its Catholic and Mercy mission:

SERVICE LEARNING

...To be a truly Mercy experience, service learning has to be grounded in Catholic Social Theory and the fundamental principles of Catholic Social Thought as it has developed over the last century. Therefore, strong preparation before the experience and deep, theological reflection after it are essential components of service learning on a Mercy campus. Moreover, such experiences need to be tied to the Mission and Direction Statement of the Sisters of Mercy to give it an authentic Mercy character.

* * *

STATEMENT ON CATHOLIC IDENTITY AND MERCY CHARISM FOR CMHE COLLEGES AND UNIVERSITIES

The Institute of the Sisters of Mercy of the Americas recognizes that higher education is integral to the mission of the Church and is an effective expression of our Mercy mission. The ministry expresses our commitment to the pursuit of truth and knowledge and to the furtherance of the social, political, economic, and spiritual well being of the human community. We encourage collaboration among Mercy institutions, regional communities and sisters in ministry.

OUR CATHOLIC IDENTITY AND MERCY CHARISM

A Mercy institution of higher education stands within the lineage of the Catholic intellectual tradition in its pursuit of truth and integration of knowledge for the common good. It participates in the Church’s mission under the sponsorship of the Institute of the Sisters of Mercy of the Americas through the ministry of education, giving tangible evidence to its mission through ongoing teaching, scholarship and service. It demonstrates the values of mercy, justice and compassion as communicated through the traditions of the Sisters of Mercy. These common characteristics are uniquely given expression within each campus community.

Graduates of Mercy institutions are informed and shaped intellectually, socially and spiritually through a faith-inspired education. The academic study of the liberal arts and sciences and mastery of the professional disciplines enable Mercy graduates to be responsible leaders in their communities and professions. They appreciate and are informed by a Christian commitment to mercy and justice in the world....

ER Ex. 5, pp. 5, 7.

C. As the Sisters of Mercy's Corporate Arm, the CMHE Maintains Reserved Powers over the University.

As its sponsors, the Sisters of Mercy have a close relationship with the University, through the CMHE. *See* Tr. 49, 53-56, 67; ER Ex. 7; ER Ex. 8. The University is a 501(c)(3) nonprofit corporation, incorporated in the state of Illinois. Tr. 25; ER Ex. 7. Under the University's Bylaws, the CMHE is the only member of the corporation. ER Ex. 8, Art. III, § 1.

As the corporate body, CMHE links the University to the Catholic Church. Tr. 49-50. To be a sponsored ministry of the Catholic Church, there must be a public juridic person, or sponsoring entity. Tr. 50. The CMHE serves as the public juridic person for the University, making the University an officially recognized ministry of the Catholic Church. Tr. 49-50.

As the sole corporate member of the University, the CMHE is vested with reserved powers, and is responsible for ensuring that the University remains true to its mission and purpose. Tr. 54; ER Ex. 8, Art. III, § 3. Specifically, the CMHE has "the responsibility to ensure that the Corporation continues its educational and religious mission and purposes, especially its Catholic-Mercy character, in accord with the University's Articles of Incorporation." ER Ex. 8, Art. III, § 3. The CMHE has the sole power to: amend the University's Articles of Incorporation; approve certain amendments of the University's Bylaws; approve changes to the University's mission statement or philosophy; approve nominees to the University's Board of Trustees; approve the finalists for the position of University President; sell, lease or dispose of University land and buildings worth over ten million dollars; and merge, consolidate or dissolve the University. *Id.* at § 3.2 & Art. XV. The University also may not

borrow or refinance a loan for more than ten million dollars, without approval of the CMHE. *Id.*⁴

Furthermore, because of its close relationship with the Sisters of Mercy, the University President and Board of Trustees consult regularly with the Sisters of Mercy and CMHE about issues and decisions affecting the University. *See* Tr. 435-436. The Sisters of Mercy voice their opinions both “in terms of the Mercy tradition and in terms of the general nature ... of any item that [is discussed]” during these consultations. Tr. 435.

II. THE UNIVERSITY’S LEADERSHIP AND CATHOLIC PHILOSOPHY

A. The University’s Leadership.

The University’s day-to-day affairs are governed by its Board of Trustees, in conjunction with the University’s President, who is also on the Board of Trustees. *See* Tr. 195, 197-198; ER Ex. 8, Art. IV, § 4.1 & Art. V; PET Ex. 1.⁵ Each member of the Board of Trustees “must be committed to the practical implications of the University’s Catholic identity.” ER Ex. 8, Art. IV, § 4.3. At least four members of the Board of Trustees must be Sisters of Mercy and the majority of the Board must be Catholic. *Id.*; Tr. 208-209.⁶

At the time of the petition,⁷ there were 24 members on the University’s Board of Trustees. Tr. 205. The Board of Trustees opens each meeting with prayer, and can attend Mass

⁴ Under canonical law, Catholic institutions seeking a loan must secure permission from the Catholic Church, so that the institution is not in danger of being controlled by an outside source, *i.e.*, an entity that is not affiliated with the Catholic Church. *See* Tr. 54-55

⁵ PET Ex. 1 contains one inaccuracy. Tr. 194. The Vice President, Office of President position was eliminated on March 1, 2011. Tr. 194.

⁶ The Bylaws state that “to the extent possible, the majority of the Board should be Catholics committed to the Church.” ER Ex. 8, Art. IV, § 4.3. However, Sister Sue Sanders testified that in her understanding “‘should’ is pretty mandatory.” Tr. 209.

⁷ All references are to the facts as they existed at the time the petition was filed. The record in this case was not reopened to introduce additional evidence on the current makeup of the Board of Trustees, any changes in leadership at the University, or other similar matters. Because the record in this case specifically incorporated the record in Case No. 13-RC-22025 and the record in that matter is being reopened for additional evidence, to the extent that any relevant evidence is introduced at the hearing in Case No. 13-RC-22025, it is specifically incorporated into the record in this case.

prior to the board meeting, although attendance at Mass is not mandatory. Tr. 434, 443. Five of the members are Sisters of Mercy, one is a priest, and at least 15 of the members are practicing Catholics. Tr. 207, 212; PET Ex. 2. The Board of Trustees also has several life trustees, including one Sister of Mercy who was formerly the Treasurer of the Chicago Sisters of Mercy. Tr. 49.⁸

The University President is the principal executive officer of the University, and is responsible for supervising and controlling “all of the business and affairs of the [University], including all matters of academic requirements and prescriptions and governance of faculty matters.” *Id.* The President has the power to appoint faculty, staff, and other employees of the University, to prescribe all of the terms and conditions for University employees, and to execute deeds, mortgages, bonds, and contracts that have been approved by the Board of Trustees. ER Ex. 8, Art. V, § 5. The University has had nineteen Presidents. *See* ER Ex. 35, p. 7. Thirteen have been Sisters of Mercy. *See id.*

The current University President, Christine Wiseman, is Catholic. ER Ex. 9, p. 2; *see* ER Ex. 36. Before joining the University, President Wiseman was the Provost and a Professor of Law at Loyola University of Chicago, the Vice President for Academic Affairs and a Professor of Law at Creighton University, and Associate Vice President for Academic Affairs⁹ and a Professor of Law at Marquette University. Tr. 356-357. Loyola, Creighton, and Marquette are all Catholic institutions founded and sponsored by the Society of Jesus,¹⁰ which is another Catholic order. Tr. 356-357, 369-370. President Wiseman took office on May 1, 2010, and her inauguration ceremony was held on October 22, 2010. Tr. 355, 358-359.

⁸ Life trustees do not have the power to vote. Tr. 206.

⁹ President Wiseman was the Associate Dean at Marquette University Law School, before becoming Associate Vice President for Academic Affairs. Tr. 356.

¹⁰ Members of this order are also referred to as Jesuits.

The President's Cabinet assists the President in executing her duties. Tr. 99, 265. The President's Cabinet includes the Provost, the University's Secretary (who is also a Vice President), and five other Vice Presidents who oversee various departments within the University.¹¹ See PET Ex. 1; PET Ex. 4; Tr. 98-99. Most of the members of the President's Cabinet are Catholic. ER Ex. 9, p. 2. In fact, the University's current Secretary, Sister Sue Sanders, R.S.M., is a Sister of Mercy. Tr. 23, 25, 98-99; ER Ex. 9, p. 7. Her predecessor was Father Francis Tebbe, O.F.M., who served as the Executive Director of University Ministry and the University Chaplain. Tr. 195-196, 270.

B. The University's Mission Statement.

Like the CMHE mission statement, the University's mission statement emphasizes its Catholic and Mercy mission: "Saint Xavier University, a Catholic institution inspired by the heritage of the Sisters of Mercy, educates men and women to search for truth, to think critically, to communicate effectively, and to serve wisely and compassionately in support of human dignity and the common good." ER Ex. 4.¹² The University reiterates this mission in its Faculty Resources Manual, which is developed by the Department of Academic Affairs and distributed to full time and adjunct faculty, as well as in numerous documents distributed to faculty, staff and students. Tr. 295-296; see ER Ex. 31, p. 1.

¹¹ President Wiseman, the University Secretary and the Vice President for University Mission and Heritage, Sister Sue Sanders, R.S.M., and the University Provost, Dr. Angela Durante all testified at the hearing. Tr. 23, 282, 355. Sister Sue Sanders has now left the University and the University's General Counsel, Kathleen Rinehart, now serves as Secretary of the Corporation and is a member of the President's Cabinet.

¹² The University changed its mission statement in 2005, to simplify it and make it easier to explain. Tr. 46, 200. The committee that drafted the new mission statement was chaired by a Sister of Mercy. Tr. 46-47.

C. *Ex Corde Ecclesiae.*

As a Catholic institution, the University is strongly committed to observing the Apostolic Constitution of the Supreme Pontiff Pope John Paul II on Catholic Universities, colloquially referred to as “*Ex corde Ecclesiae*,” or “*Ex corde*.” Tr. 305-307; *see* ER Ex. 33. *Ex corde* is the document by which the Catholic Church measures the Catholic identity of Catholic universities. *See* Tr. 306-307, 309. *Ex corde* sets forth the principles through which Catholic institutions can navigate two “orders of reality that too frequently tend to be placed in opposition as though they were antithetical,” namely the academic search for truth, and committed religious faith. *See* ER Ex. 33, ¶ 1 (describing these two orders as “the search for truth, and the certainty of already knowing the fount of truth”).

In promoting both of these goals, namely the search for truth and religious faith, *Ex corde* instructs Catholic universities to act differently than many other religious universities and institutions. *Ex corde* does not require that all faculty, staff, and students be Catholic. *See* Tr. 306-307; ER Ex. 33. Instead, it recognizes that although “[t]he university community of many Catholic institutions includes members of other Churches, ecclesial communities and religions, and also those who profess no religious belief,” these individuals “offer training and experience [which furthers] the various academic disciplines or other university tasks.” ER Ex. 33 at ¶ 26.

Under *Ex corde*, the role of the Catholic university is to “promote *dialogue between faith and reason*, so that it can be seen more profoundly how faith and reason bear harmonious witness to the unity of all truth.” *Id.* at ¶ 17. Consequently, *Ex corde* recognizes that “each academic discipline retains its own integrity and has its own methods,” and that Catholic

universities are to guarantee academic freedom. *Id.* at ¶¶ 12, 17. The Catholic Church believes that by taking this approach, it promotes religious faith:

[M]ethodical research within every branch of learning, when carried out in a truly scientific manner and in accord with moral norms, can never truly conflict with faith. For the things of the earth and the concerns of faith derive from the same God. A vital interaction of two distinct levels of coming to know the one truth leads to a greater love for truth itself, and contributes to a more comprehensive understanding of the meaning of human life and of the purpose of God's creation.

Id. at ¶ 17.

Under *Ex corde*, a Catholic university need not extinguish its Catholic faith or ignore its Catholic identity. *See id.* at ¶ 13. However, *Ex corde* focuses on the Catholic nature of the institution, not on the Catholic identity of the individuals at the institution. Tr. 428-430 (“[Cardinal George wasn’t interested in knowing how many students at the University attend Mass] because it is not ... relevant under *Ex Corde*. It is what we as an institution offer that is relevant under *Ex Corde*. *Ex Corde* talks about institutional commitment, the presentments that the institution makes.”); *see* ER Ex. 33, ¶ 14; *see also* ER Ex. 33, ¶ 49 (“[Each Catholic University] is a living *institutional* witness to Christ and his message ... Moreover, all the basic academic activities of a Catholic University are connected with and in harmony with the evangelizing mission of the Church”); ER Ex. 33, ¶ 19 (instructing every university to have a faculty or at least a chair of theology); ER Ex. 33, ¶ 29 (making Catholic Bishops responsible for preserving and strengthening the Catholic identity of Catholic universities, and instructing them not to be seen as “external agents but as participants in the life of the Catholic University”).

Paragraphs Fourteen, Fifteen, and Twenty of *Ex corde* succinctly summarize this approach by the Catholic Church, namely, that by promoting academic freedom and free

discourse in conjunction with discussions of faith and ethics, Catholic universities will promote religious faith:

14. [A] Catholic University, by *institutional commitment*, brings to its task the inspiration and light of the *Christian message*. In a Catholic University, therefore, Catholic ideals, attitudes and principles penetrate and inform university activities in accordance with the proper nature and autonomy of these activities. In a word, being both a University and Catholic, it must be both a community of scholars representing various branches of human knowledge, and an academic institution in which Catholicism is vitally present and operative.

15. A Catholic University therefore, is a place of research, where scholars scrutinize reality with the methods proper to each academic discipline, and so contribute to the treasury of human knowledge. Each individual discipline is studied in a systematic manner; moreover, the various disciplines are brought into dialogue for their mutual enhancement.

In addition to assisting men and women in their continuing quest for the truth, this research provides an effective witness, especially necessary today, to the Church's belief in the intrinsic value of knowledge and research.

In a Catholic University, research necessarily includes (a) the search for an *integration of knowledge*, (b) a *dialogue between faith and reason*, (c) an *ethical concern*, and (d) a *theological perspective*.

20. Given the close connection between research and teaching, the research qualities indicated above will all have their influence on all teaching. While each discipline is taught systematically and according to its own methods, interdisciplinary studies, assisted by a careful and thorough study of philosophy and theology, enable students to acquire an organic vision of reality In the communication of knowledge, emphasis is then placed on how *human reason in its reflection* opens to increasingly broader questions, and how the complete answer to them can only come from above through faith.

ER Ex. 33, ¶¶ 14, 15, 20 (italics in the original; underline added).

In keeping with its philosophy, *Ex corde* does not require that university staff be Catholic. See *id.* at ¶ 26 (“The university community of many Catholic institutions includes members of other Churches, ecclesial communities and religions, and those who profess no religious belief.”); Tr. 348. Instead, *Ex corde* offers that Catholic staff should serve as an example to the non-believing staff: “The Church sees [lay Catholics’] developing presence in [universities] both as a sign of hope and as a confirmation of the irreplaceable lay vocation in the Church and in the world, confident that lay people will, in the exercise of their own distinctive

role, ‘illumine and organize these (temporal) affairs . . . to the praise of the Creator and Redeemer.’” ER Ex. 33, ¶ 25.

D. The University’s Philosophy.

The University’s Philosophy Statement contains themes consistent with those espoused in *Ex corde*. See ER Ex. 22, p. 1. The University states its “commitment to a strong general education program that introduces students to college life and learning, broadens their knowledge in the arts and sciences, helps them integrate learning and community concerns,” and prepares them for success in life. *Id.* The University recognizes that its “atmosphere of intellectual rigor” is due to “academic freedom” where faculty may “develop and teach courses in their areas of advance study, extend research in their disciplines, produce scholarly and creative work, and serve the University and community.” *Id.* However, like *Ex corde*, the University’s “distinctive qualities and values ... includ[e] the belief that faith and reason can interact in mutually fruitful ways.” *Id.* As a result, the University “encourages a full search for truth, including religious truth, while respecting freedom of personal expression,” and seeks to “promote[] a vigorous and compassionate dialogue among the various faith traditions, and between them and the academic disciplines.” *Id.* This furthers the University’s mission as a Catholic university, as explained by the Provost, Dr. Angela Durante:¹³

What the mission does is provide that Catholic [lens], that Catholic culture, that Catholic ethos to the people who work in the institution and the students who are not Catholic ... to bring the culture ... the identity of a ... Catholic and Mercy institution to those people who come to us without having that background. And so, that is an important way in which we are able to have a Catholic institution and still employ those who are not Catholic or bring students in who are not Catholic.

Tr. 348.

¹³ The current Provost is Dr. Paul DeVito. Dr. DeVito would concur with Dr. Durante’s statement.

Thus, as reflected in *Ex corde*, the University focuses on its role as an institution and its institutional commitment to the faith, in contributing to the mission of the Catholic Church. ER Ex. 33, ¶¶ 14, 27. In accordance with *Ex corde* neither the Catholic Church nor the University has any interest in determining whether specific students, faculty, or staff attend mass, are religious believers, or belong to the Catholic faith. See Tr. 427-428. The focus on the institutional commitment and contribution to the mission of the Catholic Church underscores the inappropriateness of the Board's discarded substantial religious character test. As explained below, the Board's new test has the same flaws, to the extent it seeks to parse through each unit and each position, to determine the level of religious affiliation required by the University. A proper test instead should look at the University's mission and role as an institution, and its institutional commitment for furthering the Catholic Church's mission as described in *Ex corde*.

III. THE UNIVERSITY'S CATHOLIC IDENTITY AND APPLICATION OF *EX CORDE ECCLESIAE*

A. Various Expressions of the University's Catholic Identity.

The University expresses its Catholic identity and Mercy heritage in many ways. The University's motto is "*Via, Veritas, Vita*," which is Latin for "the Way, the Truth, and the Life," and is based on Jesus Christ's proclamation in the Gospel of John, Chapter 14, verse 6. ER Ex. 22, pp. 8, 10. The University is a member of the Association of Catholic Colleges and Universities, and is also listed as a Catholic university in the Official Catholic Directory, colloquially referred to as "the Kenedy Directory." Tr. 25-27, 70; ER Ex. 1. The Kenedy Directory lists only institutions that have been recognized as official ministries of the Catholic Church. See Tr. 25-27.

The University also has many symbols throughout campus that express its Catholic identity and Mercy heritage, including the following: Crucifixes of Jesus Christ hanging in

every classroom; its mission statement proclaiming its Catholic identity posted in the hallways; a large portrait of Mother Mary Catherine McAuley hangs in the entranceway to Warde Academic Center, the main campus instructional building; a statue of Mary the mother of Jesus Christ stands next to the Warde Academic Center in a circular plaza; a statue of Saint Francis Xavier stands in the University Chapel, which is on the main campus next to the Warde Academic Center; a Heritage Walk composed of pavers inscribed with the names of 172 Sisters of Mercy, representing Sisters of Mercy who have served at the University since 1956 (when it moved to the current campus), as well as the founding Sisters of Mercy, and the Sisters of Mercy who were former presidents of the University, leads into the University Chapel. Tr. 131-132, 503, 530-531; ER Ex. 19.

The University's Campus Ministry is grounded in the Catholic faith, although it provides for the spiritual needs of all the University's students, whether Catholic or a member of another faith, in keeping with Catholic teachings and tradition. Tr. 104; ER Ex. 15, p. 1; *see* Tr. 348. The University Chapel, McDonough Chapel, holds a Liturgy and Mass on Sunday evenings, and at noon on Monday, Tuesday, Thursday, and Friday. Tr. 131; ER Ex. 15, p. 3. The Sacrament of Reconciliation is also available after Mass on the weekdays. ER Ex. 15, p. 3. On Wednesday, the University hosts a communal prayer service at noon. ER Ex. 15, p. 3. The University's Campus Ministry also offers Bible Study programs with Father Bob Barry, O.P.¹⁴, a Chapel Choir, spring break service trips to help people in need, faith-based retreats, programs analyzing whether faith matters, and other similar programs to students. *See* ER Ex. 15.

The University has Residence Hall Ministers in each of its residence halls. Tr. 105-106; ER Ex. 15, pp. 7-8. They are usually a graduate student, either from the University or elsewhere and their purpose is to help students address their questions about faith and spirituality. Tr. 106.

¹⁴ Fr. Barry is no longer at the University, however, Bible Study continues to be offered.

The Residence Hall Ministers are assisted by Peer Ministers, students selected to be part of a year-long Peer Ministry program who help provide spiritual guidance and support to other students. Tr. 106; ER Ex. 15, pp. 7.

The University hosts a Medallion Ceremony every year, during which it welcomes new students and presents them with a medallion and a prayer book. Tr. 133. Faculty are expected to attend the Ceremony and to wear their academic robes. *See* Tr. 257-258, 515. Several University leaders, including the President, the Vice President for University Mission and Heritage, and a member of the Faculty, speak at the Ceremony. *See* Tr. 134-135. For the past several years, as part of the Ceremony, Sister Sue Sanders, R.S.M., has explained the University's Catholic tradition, its Sisters of Mercy heritage, and the significance of the medallion to the new students. *See* Tr. 133-135. The medallion has the University's seal and motto on the front, and a quote from the Constitutions of the Sisters of Mercy on the back. Tr. 133; ER Ex. 23. One full-time faculty member, Peter Kirstein, reported to Sister Sue Sanders, R.S.M., the University Secretary and the Vice President for University Mission and Heritage, that other faculty had told him that they found the Medallion Ceremony to be "excessively religious." Tr. 486. He suggested that she re-write parts of the ceremony to make it less religious.

The prayer book that is distributed is a compilation of religious prayers, significant quotes, and the history of the Sisters of Mercy. ER Ex. 23. The first page after the table of contents contains a letter from a former University President stating that it is her wish that "this collection of prayers opens up new ways to truth and life, leading all of us to a deeper trust of God's abiding love and holy mercy." *Id.* The prayer book is approximately 112 pages thick, and contains traditional Catholic prayers, and prayers for various situations. *Id.* Although the prayer

book contains several prayers traditionally used by Jews, Muslims, and Hindus, these occupy a mere four pages of the prayer book. *Id.* The prayer book is not only distributed to students at the Medallion Ceremony, it is also available for all faculty, staff, and students throughout the year, is distributed freely on the University's campus, and is given to members of the public. *See* Tr. 135-136.

The University's Graduation Ceremony is also replete with the University's Catholic identity and Mercy heritage. The University holds a graduation Baccalaureate Eucharist Liturgy on the day before graduation. Tr. 132. The Graduation Ceremony begins and ends with prayer, the President acknowledges the Sisters of Mercy during the ceremony, and the graduation booklet contains prayers and an explanation of the University's Seal. Tr. 132.

On October 22, 2010, the University held the Inauguration Ceremony for President Christine Wiseman. Tr. 357-358. The Ceremony began with a Eucharist Liturgy at McDonough Chapel, with students, faculty, President Wiseman's family, Sisters of Mercy and others in attendance. Tr. 358-360; ER Ex. 34. President Wiseman was then inaugurated at noon in a formal ceremony. ER Ex. 35. The ceremony included a call to order by a Sister of Mercy, a processional, a color guard, and prayer, as well as statements by, among others, the Auxiliary Bishop Emeritus, the Chair of the CMHE Board of Directors, a Sister of Mercy, and representatives of the faculty, staff, alumni and students. *Id.* at pp. 8-14. The ceremony also included the presentation of artifacts, which included a replica of the University's charter from 1847, the University Seal, a copy of the University's Mission Statement, iron keys to Saint Xavier Academy dating back to before 1871, and the University's Mercy Tea Cup and Saucer.¹⁵ *Id.* at p. 11. Most of these artifacts were presented by several Sisters of Mercy. *Id.*

¹⁵ The tea cup and saucer are a symbol of Mother Mary Catherine McAuley's request on her deathbed that her sisters have a "comfortable cup of tea," to assuage their fatigue and grief caused by her death. ER Ex. 35, p. 14.

After the presentment of artifacts, President Wiseman gave an inaugural address, emphasizing the University's Catholic identity and Mercy heritage and exhorting the faculty to exemplify the Sisters of Mercy: "For this is the obligation of mercy. And this is the obligation of each of us who teaches in these institutions. It means allowing the world and our students to see ... how people act who are immersed in rigorous intellectual inquiry and service to the poor and powerless, and yet are committed to a life of faith." *Id.*; ER Ex. 36, p. 8. President Wiseman's address was followed by a Benediction and the Provost's closing remarks. ER Ex. 35. Approximately 800 people attended the Ceremony, including over 30 Sisters of Mercy. Tr. 251.¹⁶

The University hosts three other celebrations every year to celebrate its Catholic identity and Mercy heritage. In March, the University celebrates Mission Day, which honors faculty, staff, and students for their service to the University in furtherance of the University's Catholic and Mercy educational mission. *See* Tr. 80-81; ER Ex. 27. At the celebration in 2011, the Provost spoke about the University's Catholic mission and identity, and Sister Sue Sanders, R.S.M., spoke about the Catholic and Mercy ethos of the University's mission. Tr. 80-81, 84. The University also presented three service awards: the Mother Paulita Morris, R.S.M., Student Service Award, the Sister Isidore Perrigo, R.S.M., Staff Service Award, and the Saint Xavier University Faculty Service Award. Tr. 82; ER Ex. 11. These are presented "to persons selected by their peers for their exemplary adherence to the University's core values [and] it is a day when those values – especially service, excellence, and hospitality – are much in evidence." ER Ex. 11.

¹⁶ Sister Sue Sanders, R.S.M., was asked if there were 20 or 30 Sisters at the event. Tr. 251. She testified "Maybe more but not a lot more. Under 50 I would guess." Tr. 251.

In September, the University celebrates Mercy Day and its Sisters of Mercy heritage. Tr. 80; ER Ex. 10. In 2010, the University hosted a Eucharistic Liturgy at its McDonough Chapel, and then following a reflection by a Residence Hall Chaplain, the Sisters of Mercy participated in a Mercy Heritage Walk as a “living tribute to the Mercy educators” from the past. Tr. 80; ER Ex. 10; ER Ex. 11. The University then hosted a commissioning at the Academy Bell, where “representatives from all segments of the Saint Xavier community who will serve the University in leadership roles” were commissioned. Tr. 80; ER Ex. 10. The University has already scheduled Sister Mary Sullivan, R.S.M., a Sister of Mercy who authored the biography of Mother Mary Catherine McAuley, to speak at the December, 2011, Founders’ Day Celebration. Tr. 78.

In December, the University celebrates Founders’ Day, and invites faculty, staff, students, alumni, members of the Board of Trustees and Sisters of Mercy to attend. Tr. 76-77; *see* ER Ex. 10. The University usually has a Sister of Mercy speak at the celebration. Tr. 76. For example, Sister Irenaeus Chekouras, the former president of the Sisters of Mercy, spoke at a Founders’ Day celebration. Tr. 76. In 2010, the ceremony began with a call to prayer and the ringing of the Academy Bell, which survived the Great Chicago Fire of 1871. ER Ex. 10. The attendees gathered in the McDonough Chapel, where a special Eucharistic Liturgy was held, including prayers, Mass, religious music, and presentations about the University’s Catholic identity and Mercy heritage by, among others, Sister Mary Waskowiak, R.S.M. Tr. 76-77, 84; ER Ex. 10; ER Ex. 11.

While faculty and staff are not required to attend celebrations and other campus events, Petitioner’s witness conceded that attendance was “very, very strongly encouraged.” Tr. 515. And, in fact, the University expects its faculty and staff to attend campus events, to be visible on

campus, and not to denigrate the teachings of the Catholic faith in the course of their employment at the University. *See* Tr. 330, 346-347.

Although the University does not require faculty, staff, and students to read its pamphlets, the prayer book, descriptions of its heritage and identity, posters of events, and other handouts, it makes all of these materials widely available on campus. *See* Tr. 38, 42-43, 116, 118, 130, 136, 253. It also publishes them on its website, www.sxu.edu. For example, Employer's Exhibits 2, 4, 11, 14, 15, 18, 19, 22, 30, are all prominently featured on the University's website. Tr. 27, 47, 83, 102, 104, 120-121, 130-131, 288-289.

B. The Office for University Mission and Heritage's Role in Shaping University Identity and Culture.

The Office for University Mission and Heritage¹⁷ plays a significant role in the University's Catholic identity and Mercy mission. As the Vice President of the Office, it is the duty of Sister Sue Sanders, R.S.M., to help focus the University community on its Catholic identity and Mercy mission. *See* Tr. 93. In this role, she explains the Catholic identity and Mercy heritage to new employees, new students, and new trustees. Tr. 94. Sister Sue Sanders, R.S.M., also works closely with and mentors new faculty and senior faculty, offering instruction about the University's links to the Catholic Church, the Catholic Church's obligations to the University, and what it means to be faculty at this particular Catholic university. *See* Tr. 94.¹⁸

Sister Sue Sanders, R.S.M., has interviewed full-time or tenure track faculty candidates to assess their fit within the University and has interviewed applicants for key administrative positions to "discuss the University's Catholic identity and Mercy ethos" and to determine if the applicant will fit within the University. Tr. 94, 110, 226, 264; ER Ex. 9, p. 2.

¹⁷ The Office of University Mission and Heritage is now the Office of Mission and Ministry and is headed by Dr. Graziano Marcheschi.

¹⁸ The following exhibits are produced by or fall within the domain of the Office for University Mission and Heritage: Employer's Exhibits 2 – 4, 9 – 11, 14, 17 – 19, parts of 22, and 24, 25 and 27. Tr. 228-229, 232.

Sister Sue Sanders, R.S.M., was previously the Director for the Center for Religion and Public Discourse, which is part of the Office for University Mission and Heritage. Tr. 24-25. The Center for Religion and Public Discourse has existed at the University for ten years. See ER Ex. 2, p. 1. The University established the Center following Pope John Paul II's exhortation in *Ex corde*:

[The Center] advances thoughtful and respectful discussion and scholarship in areas where considerations of economics, politics, science and the arts can be informed by ethical, spiritual and religious perspectives.

In establishing the Center, the University supports the position that Pope John Paul II takes in *Ex Corde Ecclesia*, that "a Catholic university is distinguished by its free search for the whole truth" and must, of necessity "engage in a dialogue between faith and reason." Through a series of campus and community programs and scholarly activities, the Center provides a forum for this dialogue by creating an intellectual "free zone" where timely and sometimes controversial issues can be publicly raised, presented and debated with candor and civility.

By articulating carefully reasoned ethical, spiritual, and religious perspectives about the individual and common good, the Center promotes both the "dialogue between faith and reason" and the core values of the University, especially respect, excellence, integrity and hospitality.

ER Ex. 2, p. 1.

The University created the Center with the purpose of inserting "carefully reasoned religious and ethical perspectives into [its] daily and scholarly discourse," and to "enhance the Catholic identity of [the University]." *Id.* at p. 5. The Center provides "an intellectual free zone" to promote discussions about politics, science, music or the arts as they are "informed by faith, ethical and religious perspectives, particularly Catholic perspectives" Tr. 30.

As part of this dialogue, the Center sponsors various programs throughout the University and community. See Tr. 30-32, 36-37, 95. For example, the Center sponsors the Catholic Colloquium Lecture Series, which is a series of lectures addressing the responsibility of a Catholic university to its students, faculty, staff and greater community. Tr. 31; ER Ex. 2, p. 9.

The Catholic Colloquium Series was funded by a grant from the Sisters of Mercy, to give “prominence to the Catholic identity of the university by having Catholic scholars ... present ... viewpoints on particular issues informed by a Catholic perspective.” Tr. 31. Recent speakers have included several Catholic priests, a Sister of Mercy, a Cardinal, and a Bishop. *See* ER Ex. 2, pp. 9-10. Students can satisfy one of their credit requirements by attending one of the Catholic Colloquium Series lectures, and freshmen are required to attend some of the lectures. Tr. 31-32. The University advertised the Catholic Colloquium Lecture Series by posting fliers throughout the University and the local community, and advertising on the University’s radio station. Tr. 31.

The Center also sponsors the Squeaky Weal Lecture Series, which has involved a series of lectures intended to “promote[] thoughtful consideration and civil discourse on issues of public concern, with a focus on the religious, moral and/or ethical implications of such issues for the common good.” ER Ex. 2, p. 11. Recent speakers have included President Wiseman, the Chicago Public Library Commissioner, a Cardinal, and the Cook County Board President. *Id.* The University advertised for the Squeaky Weal Lecture Series by placing ads in several Catholic Magazines; faculty, students, and the public are invited to attend. *See* Tr. 96, 147-148.

The Center produces a radio program titled “God Matters” on Sunday mornings at 9:30 a.m. Tr. 36-37. The radio program has a reach of 1 million households and is broadcast on the University’s radio station, WXAV. Tr. 36. The purpose of the program is to ask people how God is important in their lives, to link their day-to-day lives with faith. Tr. 36.

The Office for University Mission and Heritage and the Center for Religion and Public Discourse also host several other informal events between faculty and staff, which include “First Friday Tea” and “Pub Discourse.” Tr. 95; ER Ex. 9, p. 7. First Friday Tea is intended to

“exemplif[y] and encourage[] Mercy hospitality in the University community [by allowing] faculty and staff to gather as colleagues in the spirit of Catherine McAuley’s ‘comfortable cup of tea.’” ER Ex. 9, p. 7. Pub Discourse is an informal gathering at the University’s pub to discuss the “ethical aspects of some current topic.” *Id.*

Lastly, from 2006 through 2009, the Office’s Mission and Heritage Committee conducted 73 focus groups to analyze “the question of how the University did or did not embody its identity as a Catholic and Mercy institution.” *Id.* at p. 8. The Committee held separate sessions with “virtually all staff members, all faculty, and a representative (but not randomly selected) cross-section of students.” *Id.* The University then included this self-analysis in a report to the CMHE. *Id.*

C. The Sisters of Mercy’s Continued Involvement with the University.

As the public juridic person, sponsor and corporate member of the University, the Sisters of Mercy and the CMHE are intimately involved in the University’s affairs. For example, members of the CMHE often visit the University, and President Wiseman consults with various Sisters of Mercy on a weekly, if not daily, basis in order to carry out her role as the President of the University and further its Catholic identity. *See* Tr. 74, 437. Two Sisters of Mercy serve in administrative positions for the University, one as the University Secretary and the Vice President for University Mission and Heritage, and the other as the Director of the Center for Religion and Public Discourse. ER Ex. 9, p. 7. Two Sisters of Mercy volunteer in the Campus Ministry Mercy Care program, a third Sister is an Associate Professor of Chemistry, and a fourth Sister is the Director of Planned Giving.¹⁹ ER Ex. 9, p. 7. Four Sisters of Mercy associates are on the University’s faculty; one is in Religious Studies and the other three are in the School of

¹⁹ Again, the facts are set forth as they existed at the time the Petition was filed. There have been changes in leadership and personnel since that time.

Nursing. ER. Ex. 9, p. 7. The University also has a Sister of Mercy acting as a liaison between the University and the CMHE. Tr. 74.

Dr. Angela Durante, who was the University Provost at the time the petition was filed²⁰ and was the Interim President before President Wiseman, was in regular contact with the CMHE while she was Interim President. *See* Tr. 301. She was a member of the CMHE President's Council, along with the presidents of the other Mercy institutions, and she participated on the CMHE listserv. Tr. 301-302. The Executive Director of the CMHE mediates the listserv, which allows the presidents to exchange information and discuss timely issues. Tr. 302. The CMHE also worked with Dr. Durante during the transition, to ensure that President Wiseman was well prepared for her new role as President of a Catholic and Mercy institution. *See* Tr. 303-305.

President Wiseman underwent a mandatory 3-part "president orientation" with the CMHE after she became president. Tr. 368-370.²¹ Each orientation began with prayer and then involved reading and discussion designed to inform President Wiseman about her obligation to understand the University and its role vis-à-vis the Catholic Bishop and the Archdiocese, as well as the Mercy tradition as informed by the Catholic intellectual tradition. *See* Tr. 369; ER Ex. 37, ER Ex. 38; ER Ex. 39. During the first part of the orientation on October 7, 2010, representatives from the CMHE and President Wiseman discussed the "Role of Higher Education in the Mission of the Sisters of Mercy and of the Catholic Church," the University's role as a Catholic institution, and its mission in a "well-developed Christian culture" and a "post-Christian culture." *See* ER Ex. 37, pp. 1, 5, 7, 8. In the second orientation on November 12, 2010, the orientation focused on the CMHE sponsorship of the University. *See* ER Ex. 38.

²⁰ Dr. Paul L. DeVito assumed the duties of Provost on July 1, 2013. Dr. DeVito joined the University after a 30-year career at St. Joseph University in Philadelphia.

²¹ A then-newly inaugurated President from another Sister of Mercy institution, Mount Aloysius College, also attended the orientation. (Tr. 369); *see* ER Ex. 37; ER Ex. 38; ER Ex. 39.

At the orientation on December 10, 2010, representatives from the CMHE and President Wiseman discussed Catholic identity, Mercy charism, and the culture and characteristics of Sister of Mercy institutions. *See* ER Ex. 39. President Wiseman, like Dr. Durante previously, is also a member of the CMHE President's Council, which reports to the CMHE's Board of Trustees. Tr. 212.

The CMHE continues to be involved in the University. For instance, the record includes evidence of when the CMHE sent a questionnaire to the University titled "Preliminary Institutional Inventory: Developing effective methods for reporting and assessing institutional effectiveness." Tr. 69; ER Ex. 9. The questionnaire is "an accountability mechanism" that evaluates whether the University is implementing its mission, given its Catholic identity and Mercy heritage. Tr. 69-70. The University submitted its response on April 28, 2011. Tr. 71. In the first question, the CMHE asked the University to describe specifically how it "give[s] evidence to Catholic identity, Mercy core values, and the critical concerns of the Sisters of Mercy." ER Ex. 9. The University prepared a seven-page response to the question, outlining in detail its actions and concerns. *Id.* In the second question, the CMHE asked the University to identify the "mission related reporting and assessment processes, methods and/or instruments that are currently being used on [its] campus," and the effectiveness of such methods for "informing and facilitating mission-identity and mission-integration." *Id.* The University prepared a two-page response describing its methods, and their effectiveness. *Id.*

Significantly, since becoming President of the University, President Wiseman has also met regularly with Francis Cardinal George, a Cardinal of the Catholic Church and until recently the Archbishop of Chicago (now Archbishop Emeritus). Tr. 372. She meets with the Archbishop of Chicago approximately four times per year. Tr. 372. Some of the meetings have

been between only her and the Archbishop; other meetings have included representatives from all of the Catholic institutions within the Archdiocese of Chicago. Tr. 373. The Archbishop has given her specific instructions at these meetings, and has discussed the University's progress in assimilating and incorporating the directives issued in *Ex corde*. See Tr. 372; ER Ex. 40; ER Ex. 41.

Although most of the University's current income is from tuition, the Sisters of Mercy have contributed financially to the University. See Tr. 457. In recent years, the Sisters of Mercy released approximately \$800,000 to the University, from money that had been set aside from their contributed services for their retirement benefits. Tr. 457. The Sisters of Mercy also provided a subordinated loan of \$5 million to the University so that it could meet its payroll, and forestall several banks from calling their lines of credit. Tr. 456. Not only did the Sisters of Mercy provide a low rate of interest on this loan, they also agreed to postpone the accrual of interest from June 2011, until 2013. Tr. 459. The Sisters of Mercy also took a significant step by removing the restriction on part of the University's endowment, so that the University could access these funds in order to meet its current financial obligations. Tr. 456-457.

D. Religious Courses at the University.

The University has a Department of Religious Studies within the College of Arts and Sciences. Tr. 287. The Department of Religious Studies program offers a plethora of courses on Christian and Catholic faith, including: Old Testament Religion, New Testament Christianity, Christian Theology: Sacraments, Christian Theology: Church, Christian Theology: God, Christian Theology: Christ, Christian Theology: The Human Person, Seminar in Theology, Roman Catholic Tradition; American Catholic Experience, History of Christian Thought, Reformation, Seminar in the History of Theology, and Christian Ethics. ER Ex. 30, pp. 1-2.

Students may minor in Religious Studies, minor in Catholic Studies, receive a Pastoral Ministry Minor, and enroll in a Pre-Master of Divinity Program. *Id.*

The Pastoral Ministry Minor is obtained through the University's Pastoral Ministry Institute, a joint venture between the University's Department of Religious Studies and the Catholic Archdiocese of Chicago, designed to provide "responsive programming for ministerial preparation of lay ecclesial ministers, deacon couples and vowed religious leaders assuming ever increasing authority in and responsibility for the life and mission of a racially and culturally diverse church." *Id.* at p. 3.

The Pre-Master of Divinity Program is designed for undergraduate students preparing to enter Master of Divinity programs and was developed by the University "in accordance with the undergraduate theological and philosophical requirements identified by the National Conference of Catholic Bishops in the Program of Priestly Formation." *Id.* at p. 2.

Every undergraduate student at the University must take two courses in Religious Studies to graduate, although the courses do not have to be courses on the Catholic faith. Tr. 294; ER Ex. 30. Students who major in religious studies must take classes in Christian theology; students who minor in Catholic Studies must take classes focusing on the Catholic tradition and Christian theology. ER Ex. 30.

The University also offers graduate programs and seminars on the Christian and Catholic faith in the areas of scripture, theology, history, pastoral theology, and ethics. *Id.* at p. 5. Some of the seminars available to graduates are as follows: Pauline Letters, Jesus and the Gospels, Faith Development, Lay Preaching and Presiding, Pastoral Counseling, Canon Law for Lay Leaders, Christology, Ecclesiology, Catholic Moral Theology, Ethics in Pastoral Care, and Religious History. *Id.* Graduate students may also receive a Graduate Certificate in Pastoral

Studies through the Pastoral Ministry Institute. *Id.* This Certificate allows students to lay the groundwork for completing a graduate degree in Pastoral Ministry at a Catholic theological school and/or to be commissioned by the Catholic Archdiocese of Chicago. *Id.*

E. The University’s Students, Faculty, and Staff.

The University admits students of any faith and students of no faith. Tr. 242. Approximately 60 percent of the University’s students are Catholic, and approximately 2 to 4 percent of the students are Muslim. Tr. 240. The University has a Muslim Student Association, and a non-denominational Christian organization. Tr. 240-241.

In accord with *Ex corde*, the University generally does not require that its faculty or staff subscribe to the tenets of the Catholic faith, attend mass, or have any religious belief because such requirements “would be antithetical to the ecumenical character of Catholic institutions.” Tr. 428; *see also* Tr. 323, 330; ER Ex. 33, ¶¶ 21-22, 25-27. As *Ex corde* clearly explains, the Church’s and the University’s concern should be whether the University as an institution, rather than individual employees or staff, complies with the Church’s directives and furthers the Church’s mission.

LEGAL ARGUMENT

I. PACIFIC LUTHERAN UNIVERSITY

In *PLU*, the Board reexamined the standard it applied for determining when it should decline to exercise jurisdiction over employees at self-identified religious educational institutions in accordance with *Catholic Bishop*. 361 NLRB No. 157, 1. The Board discarded the “substantial religious character” test it had developed in the 36 years since the Supreme Court decided *Catholic Bishop*. Under that test, the Board decided on a case-by-case basis whether a religious-affiliated school had a “substantial religious character” and, thus, fell outside Board jurisdiction. The Board scrutinized “all aspects of a religious school’s organization and function that may be

relevant to ‘the inquiry whether the exercise of the Board’s jurisdiction presents a significant risk that the First Amendment will be infringed.’” *Trustees of St. Joseph Coll.*, 282 NLRB 65, 68 n. 10 (1986). This inquiry included the extent to which the affiliated religious group was involved in the daily operation of the school, the degree to which the school had a religious mission and curriculum, and whether the school used religious criteria in appointing or evaluating faculty. *Id.* After reviewing decisions by the D. C. Circuit in *University of Great Falls* and *Carroll College*, as well as by the First Circuit in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1986) (*en banc*), *denying enf. to* 273 NLRB 1110 (1984), and after inviting and reviewing briefs filed by interested parties, the Board put forth a new test in *PLU* that it believed “is faithful to the holding of *Catholic Bishop*, sensitive to the concerns raised by the parties and amici, and consistent with our statutory duty.” 361 NLRB No. 157, at 5.

Under its new test, the Board will not decline to exercise jurisdiction over employees (in *PLU* specifically, faculty members) at a college or university that claims to be a religious institution unless the college or university first demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment. This threshold test adopts the first two parts—but, critically, not the third part—of the D. C. Circuit’s “bright line” test under *University of Great Falls* and *Carroll College*, under which the Board lacks jurisdiction if the institution (1) holds itself out to students, faculty, and community as providing a religious educational environment; (2) is organized as a nonprofit; and (3) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. *Univ. of Great Falls*, 278 F.3d at 1343 (citations omitted). Once that threshold is met, the college or university must then show that it holds out the petitioned-for faculty members as performing “a

religious function.” 361 NLRB No. 157, at 1. “This requires a showing...that it holds out those faculty as performing a specific role in creating or maintaining the university’s religious educational environment.” *Id.* In applying its test to Pacific Lutheran University, the Board concluded that, though the university met the threshold showing that it held itself out as providing a religious educational environment, the university failed to demonstrate that it held out its faculty as performing a “specific role in creating or maintaining the university’s religious educational environment.” *Id.* at 5.

The Board’s avowed intention in fashioning this test was to ensure that the assertion of the Board’s jurisdiction, and the test the Board uses, do not violate the Religion Clauses of the First Amendment of the Constitution. *Id.* at 3. It cited *Catholic Bishop*’s admonition that “[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.” *Id.* at 3, citing 440 U.S. at 502. “First, our test must not impinge on a university’s religious rights and must avoid the type of intrusive inquiry forbidden by *Catholic Bishop*. Second, our decision on whether to assert jurisdiction over faculty members must give due consideration to employees’ section 7 rights to decide whether to engage in collective bargaining.” 361 NLRB No. 157, at 5. The Board determined that the *University of Great Falls* test “overreaches because it focuses solely on the nature of the institution, without considering whether the petitioned-for faculty members act in support of the school’s religious mission.” *Id.* at 6. It rejected the union’s and amici’s arguments that the Board should scrutinize whether faculty members actually perform a religious function, lest this result in “the type of intrusive inquiry into a university’s religious beliefs and practices which was rejected by the Supreme Court in *Catholic Bishop*.” *Id.* The focus of the inquiry is whether there is a “significant risk” of

infringement under *Catholic Bishop*, which requires an examination of the specific employees in the petitioned-for unit. *Id.* The Board cited, incompletely, *Catholic Bishop* when the Board wrote that “if teachers play a ‘critical and unique role’ in creating and sustaining a religious educational environment, the Board’s assertion of jurisdiction over them could result in interference in management prerogatives and ‘open the door to conflicts between clergy-administrators and the Board.” *Id.* at 8, quoting in part 440 U.S. at 503 (“Inevitably, the Board’s inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions.”) (emphasis added). The Board concluded that if teachers do not play a role in effectuating the university’s religious mission and are not under religious control or discipline then there are no concerns about excessive entanglement under the First Amendment. *Id.* at 8.

The Board did not want to examine actual employee functions, because to do so could raise First Amendment concerns. *Id.* Consequently, and to “avoid ‘trolling’ through a university’s operation to determine whether and how it is fulfilling its religious mission,” the Board set out its “holding out” principle: It will decline jurisdiction if the university “holds out” its employees, in communications to current or potential students and faculty members, and the community at large, as performing a specific role in creating or maintaining the university’s religious purpose or mission.” *Id.* The Board “will not examine faculty members’ actual performance of their duties.” *Id.* According to the Board, that approach “eliminates the need for a university to explain its beliefs, avoids asking how effective the university is at inculcating its beliefs, and does not ‘coerce[] an educational institution into altering its religious mission to meet regulatory demands.’” *Id.*, citing *Univ. of Great Falls, supra* at 1344-1345 (addressing universities that hold themselves out as religious or religiously-affiliated). In *PLU*, evidence that

faculty members are required to conform to its religious doctrine, tenets or beliefs, are subject to dismissal for teaching a doctrine that is at odds with the religious tenets of the institution or are expected to comply with (or not openly contravene) religious tenets, are required to serve a religious function such as integrating the institution's religious teachings into coursework, serving as religious advisors, propagating religious tenets, or engaging in religious indoctrination or religious training, will cause the Board to decline jurisdiction. *Id.* at 8, 10 n.19.

II. RELIGIOUS EDUCATIONAL INSTITUTIONS' EMPLOYEES ARE EXEMPT FROM JURISDICTION UNDER THE NLRA, REGARDLESS OF THEIR JOB DUTIES

A. Under *Catholic Bishop* and Its Progeny, Religious Educational Institutions Are Completely Exempt from the Board's Jurisdiction.

Under the Supreme Court's ruling in *NLRB v. Catholic Bishop*, religious educational institutions are exempt from National Labor Relations Act ("the Act") jurisdiction because exercising jurisdiction over them would result in excessive entanglement prohibited by the First Amendment to the Constitution of the United States of America. Accordingly, the job duties and functions of the employees at issue in this case are irrelevant.

The Supreme Court's holding applies to all of a religious educational institution's employees, regardless of their specific job duties, because otherwise, the Board would have to apply the "religious employer" exception on a job-by-job and employee-by-employee basis. That approach would unequivocally result in the same unlawful inquiry deemed unconstitutional in *NLRB v. Catholic Bishop*, and subsequent decisions by the Supreme Court and the United States Courts of Appeals. Consequently, the proper analysis is simply to determine if the employer is a religious educational institution. And the Board, of course, does not have the power to change the analysis prescribed by the Supreme Court.

Prior to *NLRB v. Catholic Bishop*, the Board took the position that it had jurisdiction over all religious educational institutions. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 497 (1979). The Board decided not to exercise its jurisdiction over schools that it deemed to be “completely religious,” but this was simply a matter of policy. *Id.* at 496-499. The Board believed that the First Amendment’s Religion Clauses did not prevent it from exercising jurisdiction over religious schools. *Id.*

The Supreme Court rejected the Board’s position in *NLRB v. Catholic Bishop*. *Id.* The Court began its analysis with the premise that an Act of Congress should not be construed to violate the Constitution if any other possible construction is available. *Id.* It reviewed the legislative history and found that “Congress simply gave no consideration to church-operated schools” when adopting the Act. *Id.* at 504. The Supreme Court determined that exercising jurisdiction over church-operated schools would raise serious First Amendment questions because it would lead to excessive entanglement. *Id.* at 502-503. Given the absence of clear Congressional intent to the contrary, the Court held that Congress did not intend to include teachers in church-operated schools within the jurisdiction of the Act. *Id.*

Although *Catholic Bishop* specifically addressed teachers in church-operated schools and the Court recognized the “critical and unique role” of teachers in fulfilling the mission of a church-operated school, the Court did not limit its holding to apply only to teachers. Instead, the Court’s holding was based on the fundamental principle that if the Act covered religious educational institutions, it would lead to excessive entanglement because of the Board’s significant role in determining and enforcing alleged violations of the Act:

Good intentions by government-or third parties-can surely no more avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining than in the well-motivated legislative efforts consented to by

the church-operated schools which we found unacceptable in *Lemon*, *Meek*, and *Wolman*.

The Board argues that it can avoid excessive entanglement since it will resolve only factual issues such as whether an anti-union animus motivated an employer's action. . . . [I]t is already clear that the Board's actions will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. 559 F.2d, at 1125, 1126. The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

Id. at 502.

Because "nearly everything" that occurs in the schools affects not just faculty but all employees and "is ... arguably a condition of employment," the Board would be responsible for deciding what constitutes terms and conditions of employment and therefore mandatory subjects of bargaining. *Id.* at 503 (internal quotations omitted). The Court, quoting an "aptly summarized" point by the Pennsylvania Supreme Court decision, noted that the "introduction of a concept of mandatory collective bargaining, regardless of how narrowly the scope of negotiation is defined, necessarily represents an encroachment upon the former autonomous position of management." *Id.* at 503. Thus, the Board's inquiry would "inevitably . . . implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions," which would "give[] rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Id.* at 503 (quoting *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). Thus, the Board cannot exercise jurisdiction over the institution, because doing so would necessarily and inevitably require the Board to review and decide the merits of sensitive religious issues and whether the institution's bargaining positions aligned with its religious purpose and professed religious values, and could potentially lead to

requirements that the institution bargain over issues directly contrary to its professed religious beliefs.²²

B. Attempting to Exercise Jurisdiction over any Religious Educational Institutions Will Result in Unconstitutional and Prohibited Inquiries, As It Did in the Regional Director's Decision.

Furthermore, if the Board were to exercise jurisdiction over what it deems to be “non-religious” employees at religious educational institutions, it would necessarily have to engage in analyzing and determining the employer’s religious mission, the employees’ role in furthering that mission, whether the employees’ duties were “sufficiently religious” in nature so as to be exempt from jurisdiction, and whether the employer was acting in good faith during bargaining in light of its professed religious values. Indeed, that is what the Regional Director did in the June 23 Order.

It is precisely these inquiries (*i.e.*, “trolling”) through the institution’s beliefs, however, that is unconstitutional. *Id.* at 502 (“It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.”); *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009) (“Probing into the school’s religious views would needlessly engage in the trolling that *Catholic Bishop* itself sought to avoid.”) (internal quotations omitted); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341-1344 (D.C. Cir. 2002) (finding that it is the intrusive inquiry, or trolling, into the institution’s religious views that violate the First Amendment); *see also Hernandez v. Commissioner of I.R.S.*, 490 U.S. 680, 694 (1989) (noting the inherent problem in having IRS agents distinguish between secular and religious activities and noting

²² The potential conflicts are readily apparent, and given the Supreme Court’s clear ruling, there is no need to describe all of the potentially sensitive issues. Suffice it to say that such issues could arise in a wide variety of areas related to the employees’ terms and conditions of employment, particularly in light of potential shifts in doctrinal interpretation.

“that pervasive monitoring for the subtle or overt presence of religious matter is a central danger against which we have held the Establishment Clause guards”) (internal quotations omitted); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring) (“What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs.”); *Cantwell v. State of Connecticut*, 310 U.S. 296, 307 (1940) (finding a state statute unconstitutional because it conditioned the receipt of solicitation licenses based on the state authority’s determination of what constituted a religious cause); *Espinosa v. Rusk*, 634 F.2d 477, 480-481 (10th Cir. 1980) (finding a statute unconstitutional where it required the state secretary to appraise the facts, exercise judgment, and form an opinion as to whether a religious institution’s activities such as feeding the poor and hungry, were for a secular or religious purpose).

As alluded to above, the Board need look no further than the Regional Director’s decision itself for an example of this impermissible entanglement where it states that “a reasonable applicant for employment as a housekeeper would not conclude that performance of their job duties requires furtherance of a religious mission.” June 23 Order, at 2. As Justice Brennan warned in his *Amos* concurrence, “the character of an activity [as religious or secular] is not self-evident,” 483 U.S. at 343, and clearly was not to the Regional Director. His conclusion overlooks the centrality to Catholic faith and Catholic identity of cleanliness as a demonstration of willing servitude. As John Wesley famously expressed in a late 18th-century sermon, “Slovenliness is no part of religion. Cleanliness is indeed next to Godliness.” The Bible is replete with examples from which Wesley drew his famous exhortation, from Haggai 2:11-14

(explaining that ceremonially pure things can be defiled by the unclean) to other examples like Genesis 18:4 (Abraham providing water to his guests so they could wash their feet) or John 13:1-17 (Jesus washing his disciples' feet). Even today, Pope Francis performs ritual washing to show his willingness, and by extension that of Catholics, "to become more slave-like in the service of people as Jesus did." See, e.g., Associated Press, *Pope Francis washes feet of prisoners, baby during Holy Week ceremony*, N.Y. Daily News, (Apr. 4, 2015, 12:29 AM), <http://www.nydailynews.com/news/world/pope-francis-washes-feet-prisoners-baby-holy-week-article-1.2173180> (quoting Holy Week homily by the pontiff). It is this very prospect of Saint Xavier being required to "litigat[e] in court about what does or does not have religious meaning [that] touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Academy*, 434 U.S. 125, 132-133 (1977)

The language in *Catholic Bishop* and the underlying logic compel the conclusion that the First Amendment prohibits the Board from exercising jurisdiction over religious educational institutions' employees regardless of the petitioning employees' job duties or function. Simply put, under *NLRB v. Catholic Bishop* and its progeny, the only appropriate inquiry is whether the employer qualifies as a religious educational institution, and to determine the answer, the Board must apply the non-intrusive three-part test adopted by the United States Court for the District of Columbia. *Carroll Coll.*, 558 F.3d at 572; *Univ. of Great Falls*, 278 F.3d at 1344-1347.

Just as with the "substantial religious character" test that *Catholic Bishop* rejected, the Board's *PLU* test, if applied in a way that is inconsistent with *Catholic Bishop* and its progeny, would fail to address the unavoidable entanglement problems that will arise when the Board is asked to enforce the Act against a religious university in the collective bargaining arena. *Catholic Bishop* and subsequent appellate cases foresaw the inevitable entanglement issues

related to the Board's role in enforcing the Act against a religious college or university through the Board's unfair labor practice procedures. Beyond the Regional Director's decision, it is not hard to see that the reality of collective bargaining and the unfair labor practice charge mechanism for enforcing the Act will lead to constitutional problems. For example, if the Region were to assert jurisdiction in this case and the unit was subsequently certified, the Board would:

- Grant to bargaining unit members a section 7 right to strike in an attempt to prevent or hinder the University from carrying out its religious mission of providing education to students;
- Require the University to negotiate over “mandatory subjects of bargaining”—wages, benefits and other terms and conditions of employment—and make it unlawful to refuse to bargain over such proposals, subjecting the University to sanctions by the Board;
- Require the University to bargain over contract provisions including seniority, job qualifications, promotions, job assignments and disciplinary criteria, that may be contrary or detrimental to the University's religious mission, and make it an unfair labor practice to refuse to bargain over the same;
- Require the University to disclose information to a union the Board deems relevant to a union bargaining proposal or grievance, or to the Board in an unfair labor practice proceeding, which can include any information, communications or documents substantiating the University's position that an employment decision or bargaining position is contrary to its religious mission;

- Prevent the University from insisting on a union waiver of the union’s right to bargain over a mandatory subject of bargaining that the University believes would infringe on its religious mission.

These problems are just a few examples of why *Catholic Bishop* concluded that “[i]nvariably the Board’s inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions.” 440 U.S. at 502-503; *accord Bayamon*, 793 F.2d at 402 (Religiously-affiliated universities pose same risk that Board will violate the Religion Clauses as do secondary schools; “[u]nfair labor practice charges would seem as likely; the Board’s likely scrutiny would seem at least as intense; the necessary distinctions between religious and labor matters would seem no easier to make; and whether one could readily “fence off” subjects of mandatory bargaining with a religious content would seem similarly in doubt”). It is not just the Board engaging in unconstitutional “trolling” to determine what a “religious” function is that violates the Religion Clauses. It is also the inevitable risk of the Board investigating and issuing unfair labor practice rulings contravening the Religion Clauses that have caused every reviewing court that examined this risk to conclude that the Board cannot assert jurisdiction over a religious and religiously-affiliated school.²³

III. IN THE ALTERNATIVE, THE REGION ERRED IN FAILING TO ORDER A NEW ELECTION

In the alternative, if the Region should determine that Saint Xavier does not hold out all members of the petitioned-for unit as performing a religious function, it must at least find that a new election is warranted because Saint Xavier lacked reason and opportunity to segregate and

²³ Even where an appellate court once permitted the Board to assert jurisdiction over particular employees at a religious school, it nonetheless recognized that Board jurisdiction “will require governmental involvement” in the unfair labor practice process. *See NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1304 (9th Cir. 1991) (recognizing that Board involvement would be required, but omitting any analysis of the inevitable risks of contravening the Religion Clauses that such involvement triggers).

challenge individual votes in the election on the basis of the voters' particular religious functions. The Region has not afforded the parties the opportunity to make a record of which members of the petitioned-for unit participated in religious programming or performed some other specific religious function. It would be impossible years after the petition was filed and the hearing was held to make such a determination, particularly given that many members of the proposed unit no longer work at Saint Xavier.

It is standard procedure that challenged votes should be segregated before impounding “as the validity of such ballots might be affected by a final Board determination.” NLRB Casehandling Manual, Part 2, Representation Proceedings, §§ 11280.3, 11302.1(a) (September 2014). This procedure was not followed in the election since, at that time, the Board had not decided *PLU* and Saint Xavier had no reason or occasion to challenge or segregate individual votes based on the particular religious mission of individuals who indisputably perform a specific religious function. Thus, absent a mechanism to link votes with their voters, the election must be deemed invalid and a new election held.²⁴ See *Grace Line, Inc.*, 4 NLRB 763, 764 (1938) (failure to segregate ballots that might have materially affected the results of an election deemed grounds for a new election); *W. Union Telegraph Co.*, 38 NLRB 483, 486 (1942) (absent method to ascertain whether ballots were cast by persons subsequently declared ineligible, a new election was required). In summary, Saint Xavier has been prejudiced not only by the ex post facto application of the new *PLU* test, but also by the Board's unusual delay in revisiting its jurisdiction over religiously identified colleges and universities, as it was deprived of the opportunity to challenge votes of those who performed a specific religious function at the time of the election. The only possible way at least partially to remedy this situation, if the Region's

²⁴ A new election would have the additional benefit of accounting for turnover in employees in the petitioned-for unit.

interpretation of *PLU* is upheld would be to hold a new election among the current housekeepers in the proposed bargaining unit.

CONCLUSION

For the foregoing reasons, the Board should discard its unconstitutional *PLU* test used to determine whether the Board had jurisdiction over religious educational institutions because it is unconstitutional and violates the First Amendment to the United States Constitution. As explained in more detail above, the *PLU* test focuses incorrectly on the religious nature and function of individual positions and individual employees, as opposed to the religious nature and function of the institution as a whole. The Board should explicitly discard this test, and adopt the three-par test used by the D.C. Circuit. As the University clearly meets the requirements set forth under the D.C. Circuit's three-part test, the Board should grant its request for review, and decline jurisdiction over the University. However, if the Board upholds the Region's interpretation of *PLU*, the Board should order a new election so that Saint Xavier may challenge the votes of current housekeepers in the unit based on their specific religious functions.

Respectfully submitted,

SAINT XAVIER UNIVERSITY

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Dated: July 7, 2015

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused a copy of the foregoing **SAINT XAVIER UNIVERSITY'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION** to be served upon the following, via e-mail, on July 7, 2015:

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